No. 80588-1

SANDERS, J. (concurring)—I concur in result but write separately to focus on the majority's errant and dangerous assumption that the government may constitutionally be in the business of prior licensing or permitting religious exercise anymore than it can license journalists. No one can say it better than did Washington Supreme Court Justice Charles Z. Smith in his dissent to *Open Door Baptist Church*[1]:

> It is my strong belief that our courts must at all time stand as a bulwark between the State and the church to assure the free exercise of religion guaranteed by our Constitution. The courts must then be vigilant against seemingly minimal encroachments by the State which would lead us towards sanctioned government intervention such as practiced in some totalitarian nations, characteristically controlling the exercise of religion through licensing schemes requiring ultimate approval by secular authorities.

This was one of only three dissents penned by this jurist during his long and distinguished career on the Washington Supreme Court. Moreover Justice Smith knew of what he spoke since he was appointed by President Clinton to serve on the United States Commission on International Religious Freedom.

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[1] *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 171-72, 995 P.2d 33 (2000) (Smith, J., dissenting).

Although I strongly dissented to *Open Door*, not even *Open Door* purported to allow the government to license religious exercise per se. Rather it concerned whether the government might condition use of a church's real estate on an application for a conditional use permit.

The majority opinion also fails to speak directly to a number of counterclaims asserted by the church that must be resolved on remand consistent with the majority opinion. Given the majority's disposition on similar state constitutional grounds, the trial court must reconsider its negative disposition of the church's causes of action under 42 U.S.C. § 1983 (the Civil Rights Act of 1871) as well as 42 U.S.C. § 2000cc (the Religious Land Use and Institutionalized Persons Act of 2000) (RLUIPA). Additionally, although not an issue for our review here, the church also claimed an entitlement to an award of reasonable attorney fees in its counterclaim. Both of the aforementioned statutes provide for such as does our common law doctrine entitling the victim of a wrongfully issued injunction to such a recovery. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154, 943 P.2d 1358 (1997).

Returning to the state constitutional analysis, I necessarily repair to the text itself. In another case arising under Washington Constitution article I, section 11, we held "[a]ppropriate constitutional analysis begins with the text and, for most purposes, should end there as well." *Malyon v. Pierce County*,

131 Wn.2d 779, 799, 935 P.2d 1272 (1997).

> **Religious Freedom.** Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Const. art. I, § 11.

Notwithstanding the textual mandate of "[a]bsolute freedom of conscience in all matters of religious sentiment, belief and worship," the majority states:

> Government burdens religious exercise "[i]f the 'coercive effect of [an] enactment' operates against a party 'in the practice of his religion . . . .'" *First Covenant*[*Church v. City of Seattle*, 120 Wn.2d 203, 226, 840 P.2d 174 (1992)] (alteration in original). This does not mean any slight burden is invalid, however. If the constitution forbade all government actions that worked *some* burden by minimally affecting "sentiment, belief [or] worship," then any church actions argued to be part of religious exercise would be totally free from government regulation. Our constitution expressly provides to the contrary. The argued burden on religious exercise must be more, it must be substantial. Here, the total refusal to process a permit application is such a burden.

Majority at 10-11 (footnote omitted). Of course I agree that refusal to process a permit application is indeed a substantial burden; however, I disagree that it is the role of black-robed judges to sit in judgment on whether a burden on religious exercise is substantial or slight when the constitution speaks of

"[*a*]*bsolute* freedom of conscience in *all* matters of religious sentiment, belief and worship." Const. art. I, § 11 (emphasis added). And although I also agree that there is an exception in the clause ("but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state"), that exception does not in any way, shape, or form, mean that religious worship that is not licentious or inconsistent with the peace and safety of the state may be even minimally curtailed. Absolute means absolute.

Moreover an important distinction must here be made between a violation of the general laws precluding excepted conduct on the one hand and a law that certain activities are prohibited unless previously specifically licensed or permitted on a site specific basis. The requirement to obtain a permit or a license is not a sanction for engaging in licentiousness or breaking the peace and safety, but rather a prior restraint on any activity subject to the permitting requirement, whether or not it may ultimately involve licentiousness, peace, or safety. "[I]f a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible." *Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975). Furthermore, the express mention of one thing in the constitution implies the exclusion of things not mentioned. *Yelle v. Bishop*, 55 Wn.2d 286, 295, 347 P.2d 1081 (1959).

Therefore, article I, section 11 of our state constitution mandates absolute religious freedom as the rule, infringement only if it fits within the plain meaning of one of the three narrowly defined exceptions. Thus these exceptions do indeed prove the rule. But prohibiting religious exercise absent a permit or a license cannot be found amongst the exceptions to the general rule of freedom.

Under the First Amendment to the United States Constitution, prior restraint of religious exercise has been discouraged since at least the time the United States Supreme Court decided *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943) and *Follett v. Town of McCormick*, 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944). There the Court held municipalities could not require religious colporteurs to pay a license fee as a condition to the pursuit of their activities, even if the license ordinance was facially nondiscriminatory. That is because "[f]reedom of press, freedom of speech, and freedom of religion are in a preferred position." *Murdock*, 319 U.S. at 115. Prior restraints on the free exercise of religious beliefs offend the Constitution. *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal*., 493 U.S. 378, 389, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990). I can find no room within the plain language of article I, section 11 to prohibit religious practice absent a previously obtained permit or license.

I doubt that a church can be held to a contract with a municipality which includes imposition of a permitting requirement that could not be constitutionally imposed in the first place. However, if so, I agree with the majority's analysis of this unconstitutional moratorium.[2]

Although not directly addressed by the majority, a number of principles set forth in its opinion tend to resolve remaining questions pertaining to a number of counterclaims in the church's favor. For the same reason the moratorium violated article I, section 11, it violates the First Amendment to the United States Constitution, thereby validating the church's cause of action under 42 U.S.C. § 1983. 42 U.S.C. § 1988 mandates an award of reasonable attorney fees to the church for violation of its federally secured constitutional rights. *See, e.g., Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002); *see also Steward Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996). So too does the majority opinion establish a violation of RLUIPA. 42 U.S.C. § 2000cc(a)(1) provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

[2] I agree with the church's argument that the contract at issue is limited to 2004, and thus no permitting requirement was even contractually imposed. However given the disposition by the majority, it simply doesn't matter.

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

Consistent with the majority opinion it would appear RLUIPA has been violated, which would also entitle the church to an award of damages and reasonable attorney fees.

By dissolving the wrongfully issued injunction, the majority also entitles the church to an award of reasonable attorney fees under *Ino Ino*, 132 Wn.2d 103. I find it somewhat ironic that the city of Woodinville relied upon this case for an award of reasonable attorney fees to itself. The Court of Appeals rejected the city's claim for precisely the reason it now turns out that the church is entitled to assert it, i.e., a party may recover all reasonable attorney fees necessary to dissolve a wrongfully issued injunction. In *Ino Ino* nude dancing girls obtained an injunction against the city of Bellevue, enjoining its alleged unconstitutional adult entertainment ordinance. In the Supreme Court, however, they lost the case (over my dissent), whereby the court ordered that they bear the full burden on their unclad shoulders of all the city's reasonable attorney fees in its ultimately successful effort to dissolve the injunction. Now it's the city's turn.

For these reasons I concur in the majority's result while expressing some reservations about its rationale.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Tom Chambers